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No. 06-144

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In The

Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*), the Minnesota Supreme Court affirmed the April 2, 2002 jury verdict judgment for Respondents (Farmers), ruling that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – a health and safety law – does not preempt Farmers' "fraudulent marketing" claim.

On May 2, 2005, Case No. 04-81, this Court remanded Petitioner BASF Corporation's (BASF) challenge to *Peterson III* "for further consideration in light of *Bates v. Dow AgroSciences, LLC*," 544 U.S. 431 (2005) (state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA).

The Questions Presented:

1. Did the Minnesota Supreme Court, applying *Bates* to BASF's "fraudulent marketing" scheme while viewing the full trial record, err in reaffirming the jury verdict judgment?

   No. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 479 (Minn. 2006) (*Peterson VI*), ("[F]armers' claims that BASF engaged in fraud, deception, and unconscionable conduct . . . are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels."); *id.* at 481-82 ("the fundamental debate is simply about how the farmers' claims are ***accurately characterized*** . . . we conclude that the record supports the farmers' characterization of their claims"); *id.* at 481 (BASF's arguments have "***little credibility***").

QUESTIONS PRESENTED – Continued

2. Did the Minnesota Supreme Court err in rejecting BASF's moot and "procedurally waived" First Amendment argument on remand?

   No. *Peterson VI*, 711 N.W.2d at 474 ("As *Bates* only involved the issue of FIFRA preemption, we review only the preemption aspect of our decision in *Peterson III*."); *id.* at 482 (BASF's complaints about the Minnesota trial court's "evidentiary rulings or jury instructions" were "procedurally waived" by BASF after intermediate state appellate court ruling).

LIST OF PARTIES

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992 and December 31, 1996 for use on their crops, except North Dakota residents who purchased Poast in North Dakota – who settled a separate class action lawsuit with BASF Corporation in 1997 for $3.5 million and national injunctive relief.
18. BASF Corporation

RULE 29.6 STATEMENT

Class Representatives include Owen Larson Farms, Inc., Christopher Grove Farms, Inc., Asbeck, Inc., Joe G. Steinbeisser & Sons, Inc., and Stephen Pust Farms, Inc. These small family-owned farm corporations, incorporated in the States of Minnesota and Montana, have no parent companies and no publicly-traded stock.

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DENY PETITION

The Court should deny BASF's injudicious second petition for certiorari.

BASF's petition ignores the *Bates* preemption test, 544 U.S. at 444, and the Minnesota Supreme Court's thorough analysis applied to BASF's fraudulent scheme. *Peterson VI*, Petitioner's Appendix (PA)1a: "[Farmers'] claims under the New Jersey Consumer Fraud Act are not preempted by [FIFRA], because they concern non-label deceptive statements and conduct and do not constitute a requirement for labeling or packaging."

BASF's first issue is misleading. The Environmental Protection Agency (EPA), under FIFRA, allows a company to container label a product for fewer than all registered uses ("split and subset labeling"), but plainly does not address fraudulent marketing schemes. *Peterson VI*, PA17a: "[F]armers' claims do not challenge the legality of BASF's subset [container] labeling, but rather its misrepresentations about the products. . . ." Nothing about the jury verdict requires BASF to do anything other than honestly market its product.

BASF's second issue is moot. BASF argues that isolated evidence of its fraudulent marketing scheme is protected commercial speech under the First Amendment. This trial "evidentiary ruling" argument, beyond the *Bates* remand, *Peterson VI*, PA5a, was "procedurally waived" by BASF after an intermediate state court appeal, PA19a.

OPINIONS BELOW

Twelve Minnesota appellate judges have studied the facts of this case as determined by the jury and unanimously and decisively rejected BASF's preemption and First Amendment arguments:

- *Peterson v. BASF Corp.*, 711 N.W.2d 470 (Minn. 2006) (*Peterson VI*) (reaffirming jury verdict judgment after remand from Supreme Court);
- *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*) (affirming jury verdict judgment);

- *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*) (affirming jury verdict judgment); and
- *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. 2001) (*Peterson I*) (remanding for trial).[1]

NO JURISDICTION FOR ISSUES WAIVED IN STATE COURT

This Court does not address issues procedurally waived by a petitioner in state court. The Minnesota Supreme Court on remand recognized that BASF's trial court "evidentiary rulings or jury instructions" issues were "procedurally waived" by BASF after *Peterson II*, an ***intermediate Minnesota appellate court ruling***. *Peterson VI*, PA19a. BASF's trial "evidentiary ruling" (First Amendment) and "jury instruction" (FIFRA requirements) issues in its petition for certiorari are beyond the review of this Court. *Stratton v. Stratton*, 239 U.S. 55 (1915) (if there is discretionary review by a higher court, the exercise of such discretion must be sought); *Matthews v. Huwe*, 269 U.S. 262, 265-66 (1925); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 3.12, p. 165 (8th ed. 2002) ("If the judgment of the trial court is subject under state law to discretionary review by a higher court, such review must be sought.").[2]

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[1] Other opinions below, in state and federal court: *Peterson v. BASF Corp.*, A04-2464 (Minn. App. 2005) (*Peterson V*), *rev. denied* (Minn. 2005) (reversing jurisdiction ruling; declining to reach "merits" of BASF's "settlement" motion); *Peterson v. BASF Corp.*, A04-1553 (Minn. App. 2005) (*Peterson IV*), *rev. denied* (Minn. 2005) (jury verdict judgment was a "final . . . common fund" judgment ending BASF's interest); *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964 (D. Minn. 1998) (*Peterson*) (remanding to state court).

[2] BASF also waived its trial "evidentiary" and "jury instruction" issues by never articulating a challenge to the *Peterson VI* "procedural waiver" ruling in its petition for certiorari. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 102, 105, 110-11 (2001) (Court will not address standing when petition for certiorari did not contest lower court ruling

(Continued on following page)

SUMMARY ARGUMENT

A. Minnesota Supreme Court, Applying *Bates* to BASF's Fraudulent Marketing Schemes, Decisively Reaffirmed Jury Verdict Judgment

1. BASF's Fraudulent Marketing And Advertising

The Minnesota Supreme Court, applying *Bates* to BASF's "fraudulent marketing" scheme, decisively reaffirmed the jury verdict. *Peterson VI*, PA13a-14a ("...mers' claims that BASF engaged in fraud, deception, and unconscionable conduct ... are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels.").

2. BASF Mis-Characterizes The Record

a. Pretends Jury Verdict Never Occurred

This case was tried to a 12-member jury over five weeks in November and December, 2001 with a unanimous finding that BASF engaged in "an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. Respondent Farmers' Appendix (RFA)1-3 (Dec. 6, 2001 Special Verdict Form).

b. Misrepresents The Facts

Upon viewing the full record, the Minnesota Supreme Court determined that BASF's appeals mis-characterize the record: "[T]he fundamental debate is simply about how the farmers' claims are ***accurately characterized*** ... we conclude that the record supports the farmers' characterization of their claims." *Peterson VI*, PA18a-19a;17a ([BASF's state registration and crop "safety ... testing"] arguments have "***little credibility***"); *see generally Supreme Court Practice*, § 6.30, p. 430

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that petitioner lacked standing); *Glover v. U.S.*, 531 U.S. 198, 205 (2001) (Court does not decide issues not articulated in petition for certiorari).

("Court relies heavily upon the good faith of petitioner's counsel in ***accurately stating . . . pertinent facts***").

c. Ignore's EPA's Conclusion It Has No Jurisdiction Over BASF's "Marketing" Scheme

Peterson III acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – "***a [BASF] marketing decision in which the EPA had no input***." PA74a (emphasis added); PX82; PX334 ("***it is related to a marketing strategy and is not a regulatory matter***") (emphasis added).[3] No authority supports BASF's overzealous disregard of the EPA's statement in this case. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984) (court defers to agency's reasonable interpretation of statute it administers); *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is . . . ***unprofessional***") (emphasis added).

d. Cannot Challenge Established Facts

BASF cannot challenge jury-established facts:

- ***Split/Subset Labeling And Different Trade Names For Same Product***: *Peterson VI*, PA17a ("***Based on the record*** . . . the farmers' claims do not challenge the legality of BASF's subset labeling [product container labeling for fewer than all EPA-registered uses], but rather its ***misrepresentations*** about the products. . . .") (emphasis added);
- ***Same product***: *Peterson VI*, PA17a ("***Based on the record***" . . . BASF's duty was to "refrain from deceptive [marketing] statements") (emphasis added);

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[3] PX82 is Farmers' Trial Exhibit 82 presented to the jury; a letter from EPA responding to a North Dakota Department of Agriculture inquiry. PX334 is Farmers' Trial Exhibit 334; a confidential internal BASF memorandum to BASF management stating the EPA was upset that BASF had deceived the North Dakota Pesticide Control Board.

Peterson III, PA71a ("***[E]vidence was presented*** that Poast and Poast Plus are essentially the same product . . . this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud.");

- ***State Registration And Crop Safety:*** *Peterson VI*, PA17a-18a (BASF's argument bears "***little credibility . . . evidence was submitted*** [to the jury] that established that the choice in this case to limit state registration and availability of Poast Plus for use on minor crops was a marketing decision intended to maximize profits, not generated by safety concerns.") (emphasis added); *Peterson II*, PA38a ("There was ***clearly evidence*** . . . that BASF believed that Poast Plus had been sufficiently tested for use on minor crops.") (emphasis added); *id.* at PA39a (farmers presented evidence, including expert testimony, from which "***jury could [conclude]***" that BASF's state registration decisions were part of BASF's national system of deceit) (emphasis added).

See, e.g., Hernandez v. New York, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we . . . defer to state-court factual findings"); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

3. Moot And Procedurally Waived Arguments

a. First Amendment Is Beyond *Bates* Remand

The Minnesota Supreme Court denied BASF's attempt to re-argue its First Amendment issue on remand. "As *Bates* only involved the issue of FIFRA preemption, we review only the preemption aspect of our decision in *Peterson III*." *Peterson VI*, PA5a.

b. Trial Evidentiary And Jury Instruction Rulings Were "Procedurally Waived" In State Court

The Minnesota Supreme Court rejected BASF's complaints about the trial court's "evidentiary rulings or

jury instructions" as "procedurally waived" in state court, *Peterson VI*, PA19a, including BASF's argument that isolated evidence before the jury of BASF's "less than candid responses" about the registration status of BASF's products was protected commercial speech. *Peterson III*, PA76a (emphasis added). This Court does not address issues procedurally waived in state court.

B. *Bates* And *Peterson* In A Nutshell

1. *Bates* Is A "Label" Case

Bates is a label-based product performance case: claims by farmers addressing the effectiveness of the product on the crop even though the EPA approved the product (container) label: (1) *crop safety claims* – the herbicide killed or injured the crop it was intended to protect; or (2) *efficacy claims* – the herbicide did not kill the weeds. Who is responsible? The EPA? The farmer who purchased a product that did not work? Or the company that sold the product for profit?

Before *Bates*, the coordinated chemical industry persuaded some courts to dismiss injured farmers' claims for the simplistic reason that the "EPA approved the label." Yes, the EPA approved the product (container) label in reliance upon the common-sense notion that a company would not seek EPA registration to sell a product that did not work. No, the EPA did not step into the shoes of the company and guarantee the effectiveness of the product and the honesty of the company's marketing campaign.

Label-based claims, like *Bates*, address the pesticide seller's sale of a product that did not work. The EPA, under FIFRA, only evaluates the safety of a pesticide (herbicide) as it affects people and the environment. Congress wrote FIFRA as a vehicle for the EPA to evaluate the relative safety of the product for people and the environment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984). Congress has never granted the EPA authority to regulate or govern a pesticide seller's marketing and pricing schemes.

Bates clarifies that the EPA, under FIFRA, does not address the effectiveness of a product – whether it will work – as marketed by the company. *Bates* affirms that state claims addressing ***marketing responsibilities*** of pesticide sellers to consumers are not preempted by FIFRA.

2. *Peterson* Is An "Off-Label" Case

Well beyond the "label" claims in *Bates*, *Peterson* presents "off-label" claims of fraudulent "marketing and pricing."

Trial evidence established that BASF defrauded thousands of farmers by deceptively marketing the same herbicide as different products – Poast and Poast Plus – at different prices as a "system of deceit" to extract inflated prices for the same herbicide from minor crop farmers.

BASF concealed from farmers and state regulatory authorities that cheaper Poast Plus, sold to soybean growers, a "major" national crop, was approved by the EPA for use on the same crops as more expensive Poast sold to growers of "minor" crops such as sunflowers, sugarbeets, potatoes, vegetables and fruits. The EPA directly informed state regulatory officials, upon inquiry, that BASF's market-segmentation scheme was "***a company marketing decision in which the EPA had no input***." PA74a (emphasis added); PX82.

The jury found that BASF's misconduct was unconscionable. BASF lied to state regulatory authorities, food processors, farmers and dealers to conceal a federal regulatory action; namely, the EPA registration of Poast Plus for the same crops as Poast, using the same safety data. BASF threatened and encouraged the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." BASF considered the "***risk***" of farmers discovering the truth, and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

3. "Label" Claims Are Not Preempted

As this Court said in *Bates*, 544 U.S. at 444:

> Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for "labeling and packaging."

Consumer fraud statutes, applied to fraudulent marketing schemes, likewise do not impose label "requirements" nor impede the EPA's mandate under FIFRA to evaluate the safety of products for people and the environment. Consumer fraud statutes only impose a duty upon global chemical companies to honestly market their product. *Peterson VI*, PA17a (***"duty ... to ... refrain from deceptive statements"***) (emphasis added). The unanimous *Peterson* jury, on December 6, 2001, found that BASF violated honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than honestly market its products.

4. "Off-Label" Claims Are Off The Radar Of Preemption

Fraudulent marketing representations – off-label claims – are far beyond FIFRA preemption. *Bates*, 544 U.S. at 444 n.17 ("To the extent that ... fraud claims are based on oral representations made by Dow's agents, they [***are not preempted***]."). The EPA through the Solicitor General acknowledged during the January 10, 2005 oral argument in *Bates* that fraudulent marketing representations are not preempted: "***[W]e agree that ... off-labeled, false misrepresentation[s] [are] ... not preempted.***" Tr. 43:4-7 (question by ***Justice O'Connor*** and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).[4]

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[4] *See* supremecourtus.gov/oral_arguments/argument_transcripts /03-388.pdf.

STATEMENT OF THE CASE

This is a consumer fraud case brought under the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. §§ 56:8-1-116 (1997), on behalf of farmers in all 50 states who purchased Poast herbicide from New Jersey-based BASF[5] in 1992-96. The class only exempts those North Dakota farmers who settled a separate class action lawsuit with BASF in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (***national reduction in price of Poast***).

BASF engaged in a national "system of deceit"– intentional misrepresentations, unconscionable commercial practices, and omissions – by marketing the same herbicide as different products – Poast and Poast Plus – to extract inflated prices from minor crop farmers.

- ***Peterson VI***, PA1a-24a ("[F]armers' claims that BASF engaged in fraud, deception, and unconscionable conduct . . . are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels.") (emphasis added).
- ***Peterson III***, PA76a ("BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast.");
- ***Peterson II***, PA36a ("jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA");
- ***Peterson I***, PA86a (remanding for a jury to determine whether BASF's herbicide marketing and pricing schemes deceived farmers and wrongfully exploited the federal EPA and state regulatory

[5] BASF is a subsidiary of a global chemical corporation, BASF Aktiengesellschaft (BASF AG), with gross yearly sales exceeding $55 billion.

process as a "system of deceit" to exact inflated prices from minor crop farmers).

A. BASF Engaged In A National "System Of Deceit" To Extract Inflated Prices From Minor Crop Farmers

BASF's misconduct and deceit arose when BASF's original product, Poast, faced competition in the national soybean (major crop) market. In the minor crop market, Poast had a dominant position. To meet competition in major crops, while retaining a premium price in minor crops, BASF deceptively devised Poast Plus and marketed expensive Poast to minor crop growers and cheaper Poast Plus to major crop growers. It was a market-segmentation scheme.

The EPA and BASF regarded Poast and Poast Plus as the same herbicide and both products were EPA-registered for the same crops based on the same residue safety data submitted to the EPA under oath by BASF. Both products were applied at the same amount of active ingredient per acre. BASF admitted in federal court and at trial that Poast was $4/acre ($32 per gallon of product) more expensive during the class period. *See, e.g., Peterson*, 12 F. Supp. 2d at 967.

B. *Peterson I* Remanded For Trial

Peterson I rejected BASF's federal preemption defense by distinguishing between regulatory compliance and consumer fraud, *Peterson I*, PA85a-86a (emphasis added):

> *BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA.* 40 C.F.R. § 152.130(b) (1994). [Farmers] presented evidence, however, to suggest that BASF designed a plan *to conceal the fact that Poast Plus was EPA registered for use on minor crops* and to discourage any off-label use of Poast Plus . . . Thus, [farmers] have shown that a genuine issue of material fact exists as to whether BASF's system of deceit falls within the broad protection of the [NJCFA].

C. Dec. 6, 2001 "Marketing And Pricing" Fraud Jury Verdict

On December 6, 2001, 12 jurors unanimously found:

We, the jury in this case, find as a Special Verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies*** for Poast and Poast Plus herbicides?

   Answer: YES X NO ___

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's ***marketing and pricing strategies*** for Poast and Poast Plus herbicides?

   Answer: YES X NO ___

If you answered "Yes" to any one of Questions 1 and/or 2 above, then answer Question No. 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

   Answer: YES X NO ___

If you answered Question No. 3 above "Yes", then go to Question No. 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992	$ 2,000,000
1993	$ 5,000,000
1994	$ 3,000,000
1995	$ 4,000,000
1996	$ 1,000,000

RFA1-3 (emphasis added). On April 2, 2002, the trial court entered a "final ... common fund" money judgment for Farmers.

D. *Peterson II* And *III* Affirm Jury Verdict Judgment

The Minnesota Court of Appeals and Supreme Court, viewing the full record, affirmed the jury verdict judgment. *Peterson II*, PA25a-53a; *Peterson III*, PA1a-24a.

E. *Bates* Embraces *Peterson*

Bates affirms that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA. 544 U.S. at 444-45. *Bates* acknowledges that "off-label" claims are off the radar of preemption. *Id.* at 444 n.17. *Bates* embraces *Peterson* confirming BASF's fraudulent "marketing and pricing" scheme.

F. *Peterson VI* Decisively Reaffirms Jury Verdict Judgment

The Minnesota Supreme Court unanimously and decisively reaffirmed the jury verdict judgment: "[Farmers'] claims under the [NJCFA] are not preempted by [FIFRA], because they concern ***non-label deceptive statements and conduct*** and do not constitute a requirement for labeling or packaging." *Peterson VI*, PA1a (emphasis added).

STATEMENT OF FACTS

A. Poast And Poast Plus Are The Same Herbicide

Poast and Poast Plus are a post-emergence grass herbicide with the same active ingredient (sethoxydim), EPA-approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. BASF's EPA registration submission certified that Poast Plus was "tolerant" for the same minor crops as Poast. PX244 (field/forage/vegetables/fruits). BASF's Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies. Tr.1340:14-18;1343:1-8;2673:6-12. Under trade names ***Vantage*** and ***Torpedo***, Poast Plus was legally used on

hundreds of varieties of minor crops across the country, i.e., delicate roses and violets and fruit-bearing trees, without crop injury. Tr.2012:14-2013:18;3110:9-3117:1.

B. BASF's Scheme: "Opportunistically Exploit" Minor Crop Farmers

BASF's exploitation of minor crop farmers originated at BASF's New Jersey headquarters in 1988. Tr.:19-25;13:1-25. BASF decided to price Poast at a premium for minor crop farmers and introduce the same herbicide, cheaper Poast Plus, to meet competition in major crops. BASF was concerned that its scheme would be uncovered, PX217 (emphasis added):

> Does it make sense to position Poast on a high price level in high value [minor] crops and introduce a 2nd grasskiller for soybeans, cotton, sugarbeets for example on a lower price level? ***Will the farmer be controlled in future***?

In 1989, at the direction of parent BASF AG, with instructions emanating from New Jersey headquarters, BASF implemented its exploitive United States' "marketing scheme." PX237. BASF's "Confidential" marketing plan for Poast included these predatory elements: "ACTIVE MARKET SEGMENTATION. OPPORTUNISTIC EXPLOITATION OF NON-SOYBEAN MARKET POTENTIAL." PX234 (emphasis in original).

By 1992, BASF had registered Poast Plus with the EPA as safe for use on the same minor crops as Poast. PX244;Tr.2149:8-2150:1;2424:19-2425:10. BASF attested to the EPA that no new residue studies were needed:[6]

> No new residue data is included and is not needed because the proposed label directions for use in the above listed crops for Poast Plus are ***identical*** to those for the registered product Poast Herbicide (EPA Reg. No. 7969-58) in terms of number of applications, pounds of active ingredient per acre, and PHI [preharvest interval].

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[6] A company must demonstrate the relative safety of a herbicide as it relates to people and the environment. 40 C.F.R. § 158.20 (1993).

PX244 (emphasis added); Tr.2684:22-2685:22. ***Poast and Poast Plus are indistinguishable when used by farmers*** except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. PX285;Tr.1291:11-1294:13; 2174:7-25;2236:1-2238:20.

C. BASF's Exploitation Scheme: Concealment Of Material Facts And Overt False Statements

The EPA *and* BASF regarded Poast and Poast Plus as the same herbicide, PX336:

> Any crops currently registered for use on the POAST label can be placed into the POAST PLUS label. All that is needed is a proposed POAST PLUS label, containing that particular use, to submit to the EPA for approval.

BASF concealed from farmers and agriculture officials – and lied when directly confronted – the truth that Poast and Poast Plus were EPA-registered for the same crops. Tr.1876:1-1879:5. BASF's "secret"[7] registration for Poast Plus was a marketing decision. PX336. The deceit is acknowledged in an October 23, 1992 memo from BASF's public relations firm to BASF's marketing division: "***[W]e run the risk of some people knowing*** POAST PLUS is also registered, but not labeled, for [minor crops]." PX41 (emphasis added).

To conceal the EPA registration of Poast Plus and advance its "Opportunistic Exploitation" scheme, BASF's marketing was blatant lies and half-truths. BASF claimed through advertising materials that Poast was the "only" product with registered residue tolerances for minor crops.

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[7] North Dakota Agriculture Commissioner Sarah Vogel detailed, to the EPA, North Dakota's discovery that BASF had lied about the Poast Plus registration, PX365 (emphasis added):

> On May 18, 1994, I received a letter from Mr. Sanders [of the EPA] stating, '. . . the crops, which appear on the Poast label, were accepted [registered] for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which the EPA had no input.***' . . . This was the first time that the Department of Agriculture learned about BASF's ***secret*** label.

Tr.447:20-449:1. BASF's product line catalog deceptively stated: "Poast Plus for postemergence grass control in multiple crops. ***Registered*** for use on cotton, soybeans, peanuts, alfalfa." PX270 (emphasis added); Tr.445:6-20. BASF executives testified the term "registered" was misleading. Tr.2223:6-12;445:8-20;461:7-21. BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops was perpetuated through publications, radio spots, ad slicks, bill stuffers, and postcards directed at minor crop farmers:

> ***Sugarbeets***
> Poast "[c]ontrols more grasses than any other sugar beet herbicide." PX263;264.
> ***Dry Beans***
> "Poast is the only over-the-top grass herbicide developed for dry beans." PX263;264.
> ***Vegetables***
> "For grass control in vegetables, Poast herbicide stands alone. No other herbicide, pre or postemergence, controls so many grasses in all these varieties." PX263;264.
> ***Potatoes***
> Poast "[c]ontrols more grasses than any other potato herbicide." PX263;264.
> ***Flax and Sunflowers***
> *"Poast from BASF is the **only** postemergence herbicide **registered** for use in flax and sunflowers."* RFA826 (emphasis added). "Poast from BASF is *the **only** postemergence herbicide **registered** for use in flax."* PX263;264 (emphasis added).

These promotional pieces misrepresented and concealed that Poast Plus was registered with the EPA for the same crops to control the same grasses, based on the same residue safety data submitted for Poast. Tr.2772:17-25. *"As far as what the plant sees, they'd see the same amount of active ingredient."* Tr.2777:1;1567:19-1569:9.

Class representatives testified they were misled by Poast and Poast Plus advertisements (Tr.1183:25-1187:7;1287:9-1288:16;1445:25-1446:3;1670:11-22) and representations by BASF field representatives at growers'

meetings (Tr.1395:25-1396:17;1443:10-1445:15;1644:18-1645:5;1669:13-1670:10). Farmers did not understand they had been deceived by BASF until North Dakota and South Dakota uncovered BASF's marketing fraud and allowed farmers to use Poast Plus on minor crops. Tr.1292:7-1294:23;1448:24-1449:7;1643:15-1644:20.

D. BASF's Enforcement Scheme: Criminal Prosecution Of Farmers As A "Marketing" Strategy – While Deceiving Farmers, Distributors, Processors And Regulatory Authorities

To exploit minor crop farmers, BASF recognized that it must actively enforce the use of Poast Plus only on major crops. PX247;250. BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast. PX251;2172:18-24. If BASF could not prevent the use of cheaper Poast Plus on minor crops, it would experience millions of dollars in lost profits on the same sales volume. RFA691. BASF recognized that the greatest risk for losing control – "***will the farmer be controlled?***" – were areas, like the Red River Valley of Minnesota/North Dakota, where the same farmers grow major and minor crops side-by-side and purchased Poast and Poast Plus. PX247;251.

BASF urged that farmers be criminally prosecuted for "off-label" use of cheaper Poast Plus on minor crops (PX258;Tr.1863:12-21) – not pursuant to the EPA's underlying taxpayer mandate to regulate the safety of herbicides for man and the environment – but criminal prosecution for "off-label" use only pursuant to BASF's "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops.[8] PX82;300;Tr.2011:16-2012:6;2012:14-2013:21;2022:1-2024:24;2026:3-2033:12.

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[8] FIFRA provides the EPA and state agriculture departments with enforcement mechanisms for violations of product labels ("off-label" use), including civil administrative penalties and criminal sanctions and fines. 7 U.S.C. § 136j-m.

As BASF's registration specialist acknowledged in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Enforcement of BASF's marketing ploy to restrict the Poast Plus label became the means for BASF's enforcement of its "Opportunistic Exploitation" of minor crop farmers. PX333;300.

BASF sent mailings to 5000 food processors and over 3000 dealers under the guise of maintaining the "safety of the food supply" and stewardship. In the mailing, BASF listed the four major crops on the Poast Plus label as its EPA registration (approved "residue tolerances"), while omitting that Poast Plus was also EPA-registered with the same "residue tolerances" for the same minor crops as Poast. PX35;249. The deceptive purpose of these mailings was to enlist food processors and dealers to restrict the use of Poast Plus to only the major crops in order to "***protect the food supply***" and "***avoid residue problems.***" *Id.* Yet, BASF had already certified to the EPA that there were no residue or crop safety (tolerance) problems in using Poast Plus on minor crops. Tr.2684:22-2685:22. BASF fraudulently and unconscionably used food processors and dealers to enforce its "Opportunistic Exploitation" of minor crop farmers and conceal the EPA registration of Poast Plus. PX249.

To further reinforce the risk of off-label use of Poast Plus, BASF used its public relations firm to draft a Position Paper that was mailed to a wide variety of agencies and processors involved with minor crops that could influence farmers regarding off-label use of Poast Plus. PX253;Tr.1857:13-1858:13. The Position Paper stressed "hefty fines" for off-label use and the dangers to consumers and the environment (PX252A;253B), even though BASF knew that Poast Plus was EPA approved as safe for use on the same crops as Poast. PX244. The Position Paper falsely stated that Poast was, "[T]he ***only*** postemergence ***product registered*** to control grasses in [minor crops] . . . " PX252A (emphasis added); Tr.3588:15-24.

E. BASF's Deceit Unravels: Farmers And State Officials React When Truth Of EPA Registration Status Of Poast Plus Becomes Known

BASF's own sales force predicted that BASF's fraudulent "Opportunistic Exploitation" scheme would fail, PX402 (emphasis added) (Tr.2231-33):

> One more group can be added to the growing list of people who are not happy with the ***sethoxydim market segmentation scheme*** from BASF. A research agronomist from ***Pillsbury Green Giant*** called to discuss quote "the similarity between the two sethoxydim formulations." To him, it was very clear that their company and the food processors in general were being singled out and asked to pay a much higher price for post emergence grass control.

The grim concern of BASF and parent BASF AG at the dawn of the scheme – "***Will the farmer be controlled***" – proved prescient. RFA450 (emphasis added). Minor crop farmers began disregarding BASF's container (marketing) label restricting Poast Plus to major crops. RFA1466;780;793;969 (BASF memo describing scheme as "becoming transparent").

BASF egregiously enacted a strategy to use state agriculture departments to perpetuate its "Opportunistic Exploitation" scheme by using their agriculture inspectors to "monitor and enforce the use of Poast over Poast Plus". PX217. BASF turned in its own dealers to Agriculture Inspectors for selling Poast Plus to farmers growing minor crops. PX251;276;384. This resulted in "hefty fines" to dealers and farmers despite the fact that EPA approved Poast Plus safe on minor crops. RFA849;Tr.1727:2-17. As prosecutions increased, BASF took the extreme step of lying to state Agriculture Departments regarding EPA registration of Poast Plus. *See, e.g.*, Tr.1730:13-1731:12. For example, BASF executives lied to the North Dakota Pesticide Control Board ("Control Board") to conceal the EPA registration of Poast Plus for the same crops as Poast. Tr.1876:1-24;1877:20-24;1929:2-18. A BASF memorandum noted the need to "develop a strategy" ***if North Dakota officials had already learned the truth*** (PX71) (emphasis added):

> North Dakota State has indicated that they have requested information from EPA *and may know* by the time of the March 28 meeting that *Poast Plus is also labeled in all these crops and that BASF has chosen not to extend this label to the marketplace*. . . . This will involve some ***nebulous argumentation*** . . . that EPA could request side-by-side residue work for Poast Plus and Poast.

Minutes of the March 1994 Control Board demonstrate BASF's overt lies:

> *BASF was asked if they could expand the Poast Plus label* [to all minor crops on the Poast label]. *They said they could not* because of economics. When questioned on whether the EPA may allow them to expand the Poast Plus label based on the current residue package submitted on sethoxydim, *BASF did not know*. However, they feared if they put this issue to question with the EPA, *the* ***EPA may require BASF to do residue testing for the Poast Plus as well.***

PX73 (emphasis added);Tr.1888:25-1889:12. The Control Board wrote the EPA to determine if Poast Plus *could be registered* for use on minor crops. The EPA responded:

> A review of our records indicate that the crops, which appear on the Poast label, were accepted (registered) for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which EPA has no input.***

RFA385 (emphasis added); Tr.1888:25-1890:7. A confidential internal BASF memorandum to management states that the EPA was upset that BASF had deceived the Control Board:

> Mr. Taylor (EPA) told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***. Furthermore, EPA has already granted registration of POAST PLUS in most of the crops for which POAST is labeled, without requiring additional residue data from BASF. Mr. Taylor knows that the statement made to Ms. Vogel and attributed to BASF is ***incorrect***, and ***he is not pleased that BASF misdirected her*** as to where the issue really lies.

PX82 (emphasis added). At trial, a BASF executive, ***admitted that the statements he and another BASF executive made to the Control Board were false***, but that he ***was told*** to make them by senior executive William Wisdom. Tr.458:1-23.

As BASF turned in dealers and farmers for off-label use of Poast Plus, minor crop farmers petitioned regulators for the right to use cheaper Poast Plus. PX396;397. After BASF's lies were uncovered by North and South Dakota authorities, RFA857-58, North and South Dakota issued 7 U.S.C. § 136v(c)(1) (Rule 24(c)) registrations to use cheaper Poast Plus on minor crops.[9] PX298;129. Although BASF opposed the Rule 24(c) labels, BASF's own trade and lobbying organization (American Crop Protection Association) refused to support BASF's opposition. PX291. North Dakota Agriculture Commissioner Vogel bluntly responded to BASF's opposition: *"[BASF] has eroded public respect for the registration process."* PX291 (emphasis added).

The EPA rejected BASF's opposition. PX132;Tr.2669:17-2670:20;Tr.2689:5-9. Minnesota and Montana officials also considered a Rule 24(c) label for Poast Plus after learning that North and South Dakota had done so. PX133;300;313 ("[BASF] believe[s] the state of Minnesota may also have granted a 24(c) registration for Poast Plus for the same uses."). The matter became moot for ***Minnesota and all other states*** because, after the actions of North and South Dakota and commencement of the *Tompkins* class action in North Dakota, ***BASF reduced the price of Poast to equal Poast Plus nationwide in 1997***. Clerk Doc. 563.

F. BASF's "System Of Deceit"

The unanimous *Peterson II* court concluded, PA28a-29a:

> The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with

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[9] BASF's reaction to the North and South Dakota 24(c) registrations was predatory. BASF, through a personal telephone call from Executive William Wisdom, ***maliciously threatened to personally sue North Dakota Agriculture Commissioner Sarah Vogel***. Tr.1759:14-25-1760:1-11.

the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor corps. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

Farmers' FIFRA expert, Dr. Charles Benbrook, testified: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. Agriculture Commissioner Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***" Tr.1878:5-6; 1559;1746:2-23;1748:22-1749:9;1753:14-15;1756:1-7;1758:13-20; 1765:17-1766:5;1788:6-11;1830:19-25;1878:7-1879:14. BASF's management conceded that BASF's marketing for Poast Plus was misleading, Tr.461:11-20:

A. (Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

ARGUMENT

I. MINNESOTA SUPREME COURT, APPLYING *BATES* TO BASF'S FRAUDULENT MARKETING SCHEMES, DECISIVELY REAFFIRMS JURY VERDICT JUDGMENT

Bates holds that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA, 544 U.S. at 443-49:

- FIFRA is not intended to deprive injured parties of compensation under state claims addressing pesticide sellers' marketing responsibilities to consumers;
- Jury verdicts do not establish "labeling and packaging" requirements; and
- Off-label claims are beyond FIFRA.

A. Presumption Against Preemption

This Court in *Bates* emphasized: "[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In areas of ***traditional state regulation***, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" 544 U.S. at 449 (emphasis added; citations omitted).

B. Jury Verdicts For Fraudulent Marketing Schemes Do Not Establish "Labeling And Packaging" Requirements

This Court in *Bates*, rejecting the chemical industry complaint that product marketing claims are preempted by FIFRA, a health and safety law, expressed a two-part preemption test, 544 U.S. at 444 (emphasis in original):

> For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement "*for labeling or packaging*"; rules governing the design of the product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is "*in*

addition to or different from those required under [FIFRA]."

1. First *Bates* Test Is Dispositive: BASF Complaint That Jury Verdict Requires "Labeling And Packaging" Change Violates Commonsense And Misrepresents And Denies Historical Record

a. Violates Commonsense

Farmers' jury verdict judgment, grounded in BASF's off-label "marketing" misconduct, is far beyond the *Bates* preemption test. The jury verdict against BASF, under the NJCFA, absolutely does not impose a "requirement for 'labeling and packaging.'" The Minnesota Supreme Court was clear, *Peterson VI*, PA13a-14a:

> We concluded [in *Peterson III*], and we do so again, that the farmers' claims that BASF engaged in fraud, deception, and unconscionable conduct in violation of the [NJCFA] are based on BASF's marketing and advertising actions and not on the content of the product labels.

The jury verdict does not impede the EPA's mandate under FIFRA to evaluate the safety of products for people and the environment. The unanimous jury found that BASF violated honesty in the marketing of its herbicide.

Nothing about the jury verdict requires BASF to do anything other than honestly market its product. *Peterson VI*, PA17A ("***The duty*** the farmers' claims imposed on BASF was . . . to ***refrain from deceptive statements*** about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops.") (emphasis added). FIFRA does not preempt consumer fraud claims; it coexists with state remedies to prevent market fraud.

b. Misrepresents And Denies Historical Record

BASF's argument that the Minnesota fraudulent "marketing and pricing" jury verdict is a requirement for "labeling and packaging" misrepresents the historical

record by glaring omission. After North Dakota and South Dakota uncovered BASF's fraud and commencement of the North Dakota class action, BASF ***did not change the label*** but merely equalized the price of Poast and Poast Plus. *See Tompkins, et al. v. BASF Corp.*, Civil No. 96-59, Traill County, ND (1996) ("*Stipulation of Settlement*" for *Tompkins*) (executed March 14, 1997), at p. 8 (emphasis added): "***After filing of [farmers'] lawsuit***, in contemplation of the 1997 growing season, [BASF] determined unilaterally to effect a nationwide price reduction of [Poast], thereby causing the ***price of Poast to be equivalent to the price of Poast Plus*** on a per acre basis."

c. "[I] Can Take Hard Answers, But Don't Lie . . . Just – You Don't Lie"

BASF fails the "labeling and packaging" test for another reason. BASF's off-label marketing misconduct; lies, deceit and smoking-gun evidence, is off the radar of preemption:

- BASF internal marketing memo (PX234) discussing the "***risk***" of farmers across the United States discovering the truth.
- BASF internal marketing memo (PX217) expressing grim concern that its deceitful scheme would be uncovered by farmers: "***Will the [North American] farmer be controlled in future?***"
- "***Opportunistic exploitation***" of minor crop farmers by threatening and encouraging the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX232;258;82;300.
- BASF internal memorandum (PX334): EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials.
- BASF executive Chris Coombs at trial admitted "***false . . . statements***" to North Dakota Pesticide Control Board but said he was told to make the statements by BASF management. Tr. 458:12-24; 459:1-4; 461:9-19).

- North Dakota regulatory officials testifying at trial about BASF's lies and deceit: "***[I] can take hard answers, but don't lie . . . Just – you don't lie.***" (Tr. 1878:5-6).

Bates, 544 U.S. at 444 n.17 (off-label marketing misconduct is outside preemption).

2. Second *Bates* Test Is Never Reached: *Peterson* Is Not A "Misbranding" Case Challenging Accuracy Of Statements On The Label

Peterson is an off-label "fraudulent marketing" case. It is not a "misbranding" case, like *Bates*, with a label stating the herbicide is "safe" for peanuts, when there is evidence the defendant company knew the herbicide might kill the peanut crop in certain soil conditions. *Peterson* does not challenge the veracity of statements on the product container label. Pints are pints; ounces are ounces. *Peterson VI*, PA16a, quoting *Peterson II* (emphasis in original):

> [T]he farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *.

C. Regulatory Compliance Has No Relation To Consumer Fraud

1. EPA Allows "Split And Subset Labeling" But Does Not Address Marketing Strategies

BASF's claim that EPA approval of the Poast and Poast Plus container labels also grants BASF license to perpetrate a fraudulent "marketing and pricing" scheme is plainly false. As recognized in *Peterson VI*, PA17a, *Peterson II*, PA35a-36a and *Peterson I*, PA85a, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R.

§§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e).

The EPA does not ascertain why companies spiit or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added). BASF's registration specialist acknowledged in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Simply stated, the EPA does not address company marketing and pricing schemes. *Peterson VI*, PA17a ("farmers' claims do not challenge the legality of BASF's subset [container] labeling, but rather its misrepresentations about the products. . . .").

2. BASF's Regulatory And Marketing Experts Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' claims were based on BASF's broad scheme of fraudulent "marketing and advertising" and not a claim of "misbranded" product labels. *Peterson IV*, PA15a-16a (quoting *Peterson III*). During trial, BASF's regulatory and marketing experts and management conceded the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product: Daniel Barolo (***BASF FIFRA expert***) (EPA and state regulatory process has no relation to consumer fraud), Tr.2697:7-11; Dr. Dale Dahl (***BASF marketing expert***) (irregardless of EPA and patent registrations, company can still commit consumer fraud in the sale of its product), Tr.3352:5-17; William Wisdom (***BASF management***) (EPA does not concern itself with company marketing practices), Tr.1017:7-15.

D. BASF's Injudicious Second Petition Is A Game Of "Do-Over"

1. Factual Argument BASF Lost Before The Jury

a. Same Product

BASF's complaint that Poast and Poast Plus are not identical, is a misrepresentation of Farmers' fraudulent "marketing and pricing" claim under the NJCFA. Poast and Poast Plus are essentially the same product; that is, Poast and Poast Plus have the same active ingredient (sethoxydim), are EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. ***Poast and Poast Plus are indistinguishable when used by farmers*** except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. Tr.1291:11-1294:13;2174:7-25;2236:1-2238:20.

The unanimous Minnesota jurors and appellate judges readily understood that BASF deceptively marketed Poast and Poast Plus as different products, at different prices, as a "system of deceit" to extract inflated prices from minor crop farmers. The Minnesota Supreme Court on remand re-emphasized:

> "[W]e again reject BASF's characterization of the farmers' claims as requiring that the two products be labeled as one. While the farmers might have believed that would have been a more honest approach for BASF to take, that was not the factual or legal basis for their claims. The duty the farmers' claims imposed on BASF was not to register and label Poast and Poast Plus as one product, but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops.").

Peterson VI, PA17a; *Peterson III*, PA71a (***"[E]vidence was presented*** that Poast and Poast Plus are essentially the same product . . . this evidence was presented to illustrate . . . a scheme to exploit the farmers through consumer

fraud.") (emphasis added); *Peterson II*, PA33a ("jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and ***we will not substitute our judgment for that of the jury.***") (emphasis added); *see, e.g.*, PX117 (BASF July 3, 1995 internal memorandum discussing "***market strategies***" of "***differential pricing of the same active ingredient***") (emphasis added).

b. State Registration And Crop Safety

BASF argues it was not required to register Poast Plus, and did not register Poast Plus, for minor crops in any state. BASF also complains the potential for crop injury prevented BASF from registering Poast Plus for minor crops.

BASF disingenuously ignores jury evidence that in a variation of its market-segmentation scheme, BASF re-named Poast Plus as ***Vantage*** and ***Torpedo***, PX95;240;323;325, and procured state registrations for their use on minor crops throughout the United States at ***twice the price of identical Poast Plus***. PX135;Tr.2012:14-2013:18;3110:9-3117:1. Under alternate trade names, Poast Plus was legally used on hundreds of varieties of minor crops across the country, i.e., fruits, Christmas trees, delicate roses and violets, without crop injury. PX95;135; 240;321; 323;325; Tr.2012:14-2013:18;3110:9-3117:1. The Minnesota Supreme Court, viewing the full trial record, pointedly said on remand:

> With regard to BASF's third argument, that the farmers' claims would require marketing products in all 50 states and on all crops for which they are EPA-registered, regardless of the manufacturer's concerns for safety and the need for additional testing, we note first that this is a policy-oriented argument that is not founded on the preemption criteria under FIFRA. Moreover, we are compelled to observe that ***under the facts of this case the argument bears little credibility.*** BASF assured the EPA that no additional testing was required for its registration of Poast Plus for minor crops because the results would be the same as those it had submitted in support of its registration of Poast.

> Furthermore, ***evidence was submitted*** that established that the choice in this case to limit state registration and availability of Poast Plus for use on minor crops was a ***marketing decision*** intended to maximize profits, not generated by safety concerns.

Peterson VI, PA17a-18a (emphasis added); *see also Peterson II*, PA39a (farmers presented evidence, including expert testimony, from which ***"jury could [conclude]"*** that BASF's state registration decisions were part of BASF's national system of deceit) (emphasis added).[10]

2. "Procedurally Waived" And Misplaced Effort To Reargue Trial Evidentiary And Jury Instruction Rulings

This Court does not address issues "procedurally waived" in state court. *NO JURISDICTION FOR ISSUES WAIVED IN STATE COURT*, p. 2, *supra*. To leave no stone unturned, on remand the Minnesota Supreme Court went beyond its "procedurally waived" ruling to squash BASF's argument, *Peterson VI*, PA24a (emphasis added):

> BASF's proposed instructions ***do not relate directly to the charge before the jury***, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final argument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

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[10] BASF's state registration argument is a disguised effort to reargue causation, an issue resolved in *Peterson III* and *II* and outside *Bates*, federal preemption, and BASF's FIFRA petition issue. *Peterson VI*, PA17a ("a policy-oriented argument that is not founded on the preemption criteria under FIFRA . . . the argument bears little credibility"); *Peterson III*, PA77a-81a; *Peterson II*, PA36a-40a; *see generally* Dunnell Minn. Digest, *Torts*, § 1.03 (4th ed. 2000) (***causation is a quintessential jury issue***).

II. MINNESOTA SUPREME COURT REJECTED BASF'S MOOT AND PROCEDURALLY WAIVED FIRST AMENDMENT COMPLAINT ON REMAND

BASF's First Amendment issue (trial "evidentiary ruling"), beyond moot and "procedurally waived" in state court, is ridiculous. Fraudulent marketing representations are never protected speech. *See Illinois ex rel. Madigan, Attorney General v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 617 (2003); *Greater New Orleans Broadcasting Assn. v. U.S.*, 527 U.S. 173, 183 (1999); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-64 (1980); *Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979). Unlike *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), a political activist challenging advertisements by Nike defending its treatment of Southeast Asian workers, *Peterson* does not involve ideological use of a consumer fraud statute *without personal injury* to engage a *public policy* debate. The *Peterson* plaintiffs are not ideological; they suffered direct harm. They are at the opposite end of the spectrum: farmers defrauded of millions of dollars by BASF's deceit.

CONCLUSION

BASF's "system of deceit" was addressed by the Fargo (ND) *Forum* after BASF's marketing deceit was uncovered by the North Dakota Department of Agriculture, Clerk Doc. 562:

> Shame on chemical company. . . . Its not just the money. BASF has been caught with their pants down. They have seriously undermined farmer confidence in the honesty of chemical companies and the integrity of safety rules. Shame on them.

For all the foregoing reasons, the Court should deny BASF's petition.

Respectfully submitted,

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October 11, 2006

APPENDIX TABLE OF CONTENTS

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December 6, 2001 Special Verdict Form..... RFA1

RFA1

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL COURT
CIVIL DIVISION

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc., Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove, Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck Inc. Donald Steinbeisser, Joe G. Steinbeisser and Sonds, Inc., Stephen Pust, and Stephen Pust Farms, Inc., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BASF Corporation, a foreign corporation,

Defendants.

PHOTOCOPY

SPECIAL VERDICT FORM

Court File No. C9-98-656

We the Jury, duly impaneled and sworn in the above-captioned matter, give the following answers to the following special verdict questions:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

Answer: X (YES) _____ (NO)

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus?

Answer: X (YES) _____ (NO)

If you answered "Yes" to either Questions 1 and/or 2 above, then answer Question 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

Answer: X (YES) _____ (NO)

If you answered Question 3 above "Yes" then go to Question 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992 $2,000,000

1993 $5,000,000

199[4] $3,000,000

1995 $4,000,000

1996 $1,000,000

Dated this 6th day of December, 2001, at 1:47 pm o'clock _.m. in the County of Norman, Ada, Minnesota.

/s/ Clarisse Austinson
FOREPERSON

After six hours of deliberation, ten of the jurors may agree upon and return the special verdict form.

If only ten of twelve jurors concur, all concurring jurors must sign:

1. _____	6. _____
2. _____	7. _____
3. _____	8. _____
4. _____	9. _____
5. _____	10. _____

This special verdict form was signed at ___ o'clock __.m.

Dated: _____, 2001.

_____